

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOEL TORRES

Claimant

VS.

DeKALB SWINE BREEDERS

Respondent

AND

PACIFIC EMPLOYERS INSURANCE

Insurance Carrier

AND

WORKERS COMPENSATION FUND

Docket Nos. 173,738
& 181,698

ORDER

On July 2, 1996, the application of claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Jon L. Frobish on February 21, 1996, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Thomas R. Fields of Kansas City, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Douglas C. Hobbs of Wichita, Kansas. The Kansas Workers Compensation Fund appeared not, having been dismissed from this matter.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the Appeals Board considered the medical records of Dr. Paul Stein stipulated into evidence by the parties.

ISSUES

Claimant listed the following issues on appeal:

- (1) That the Court erred in determining that the claimant has suffered no permanent disability and that the Court erred in not awarding a work disability pursuant to K.S.A. 1992 Supp. 44-510e(a). Both of these issues can be considered as part of the nature and extent of claimant's injury and/or disability in both claims.
- (2) Claimant's entitlement to unauthorized medical in Docket No. 181,698.
- (3) Claimant's entitlement to have the balance of \$990 owed for the treatment of Dr. Fernando Egea paid as authorized medical.
- (4) Whether the deposition transcript costs for the deposition of Joel Torres, James Ziegler and Dr. Fernando Egea should be assessed against the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

With regard to the nature and extent of claimant's injury and disability the findings and conclusions listed by the Administrative Law Judge in the Award are set out appropriately and in some detail and it is not necessary to repeat same herein. Those findings and conclusions enumerated in the Award are accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein.

Specifically, it is noted claimant's entitlement to an award hinges, to a significant degree, upon the claimant's own credibility. The videotape placed into evidence casts serious doubt upon claimant's credibility as the ability to perform several physical activities by claimant were specifically denied by claimant while under oath; the claimant's allegation of confusion or faulty memory notwithstanding. It is also noted that the only health care practitioners who provide claimant with any permanency from these alleged injuries did so based upon claimant's subjective allegations of pain and upon a misreading of an MRI. It is claimant's burden to prove by a preponderance of the credible evidence, his entitlement to benefits in this matter (see K.S.A. 44-501 and K.S.A. 44-508(g)). The Appeals Board finds that claimant has failed to prove his entitlement to a permanent award from these injuries. Therefore, the finding by the Administrative Law Judge that claimant has suffered no permanent disability is affirmed.

K.S.A. 1992 Supp. 44-510(c) allows up to \$350 unauthorized medical when the services of a health care provider furnished by the respondent are not satisfactory to the employee. The Administrative Law Judge denied claimant unauthorized medical in Docket No. 181,698 finding claimant had already utilized his unauthorized medical in Docket No. 173,738 with Dr. Prostic. The statute does not limit claimant to one unauthorized medical allowance per litigation but rather limits claimant to one unauthorized medical allowance per injury. In this instance claimant would be entitled not to \$350 in unauthorized medical

for his claims against DeKalb, but rather to \$350 per claim. As he has filed two claims claimant would be entitled up to \$350 per claim in unauthorized medical upon presentation of itemized statements verifying same. In this regard the Award of the Administrative Law Judge is modified to reflect the intent of K.S.A. 1992 Supp. 44-510(c).

With regard to the medical tests of Dr. Fernando Egea, it appears as though claimant had been provided authorized medical treatment and respondent paid for the medical care provided by several health care practitioners. The medical being provided by Dr. Egea was clearly unauthorized and no request was made by claimant to authorize same during the pendency of this litigation. As such, the denial by the Administrative Law Judge of claimant's request that Dr. Egea's medical tests be authorized is affirmed.

With regard to the assessment of certain administrative costs assessed against the claimant, K.A.R. 51-2-4 grants the administrative law judge the right and the power to assess fees in the final award. No explanation is provided by the Administrative Law Judge as to the reason for assessing the deposition costs of Joel Torres, James Ziegler and Dr. Fernando Egea against the claimant, but the Board can surmise the Administrative Law Judge felt assessing the costs appropriate when considering the problems created by claimant's early inaccurate and potentially false testimony regarding his ability or inability to perform certain work tasks. As such, the Appeals Board finds the Administrative Law Judge's decision to assess certain costs against the claimant to be appropriate and affirms same.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated February 21, 1996 should be affirmed in part and modified in part in that the claimant, Joel B. Torres, is denied a permanent award against the respondent, DeKalb Swine Breeders, and its insurance company, Pacific Employers Insurance, for accidental injuries on December 7, 1992 and February 23, 1993. Claimant is entitled to unauthorized medical in both Docket Nos. 173,738 and 181,698 in the amount of \$350 per docket claim upon presentation of an itemized statement verifying same with the respondent being provided credit for amounts previously paid. The \$990 in additional medical expenses for the services provided by Dr. Fernando Egea shall remain as unauthorized medical.

Claimant is entitled to future medical only upon proper application to and approval by the Director.

Claimant is entitled to vocational rehabilitation benefits only upon proper application to and approval by the Director.

The fees and expenses necessary to defray the expense of administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Susan Maier
Deposition of Gary Faust

\$320.38

Underwood & Shane	
Transcript of Regular Hearing	\$531.00
Deposition Services	
Deposition of Ely Bartal, M.D.	\$265.60
Deposition of Philip R. Mills, M.D.	\$338.80
Cindy Fenton	
Deposition of Ely Bartal, M.D.	Unknown
Taylor Reporting	
Deposition of Joel Prostic, M.D.	\$296.35
Deposition of Michael Dreiling	\$535.75
Tri-State Reporting Services	
Transcript of Preliminary Hearing	\$117.40

The fees and expenses necessary to defray the expense of administration of the Kansas Workers Compensation Act are hereby assessed against the claimant to be paid as follows:

Underwood & Shane	
Deposition of Joel Torres	\$353.50
Cindy Fenton	
Deposition of James Ziegler	Unknown
Taylor Reporting	
Deposition of Fernando Egea, M.D.	\$244.85

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas R. Fields, Kansas City, KS
Douglas C. Hobbs, Wichita, KS
Wendel W. Wurst, Garden City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director